Supreme Court, U.S.
FILED
SEP 23 1994
OFFICE OF THE CLERK

No. 94-152

In The

Supreme Court of the United States

October Term, 1994

DAVID C. OTIS, et al.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Iowa Supreme Court

REPLY BRIEF TO BRIEF IN OPPOSITION

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15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI..... 1

1. Introduction 1

2. The RLA, the FRSA, or the combination of both, do not preempt Iowa Code § 730.5..... 2

3. There is no valid alternate ground of decision based on a claim to a right of summary judgment due to res judicata 4

CONCLUSION 6

APPENDIX .....App. 49

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)..... 2

American Dredging Co. v. Miller, ___ U.S. ___, 114 S.Ct. 981 (1994)..... 3

Andrews v. Louisville & N.R. Co., 406 U.S. 320 (1972)..... 3

Cipollone v. Liggett Group, Inc., 505 U.S. ___, 112 S.Ct. 2608 (1992)..... 4

Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc., 372 U.S. 714 (1963)..... 3

Consolidated Rail Corp. v. Railway Labor Executives Ass'n, 491 U.S. 299 (1989)..... 1, 2, 5

Harris v. Jones, 471 N.W.2d 818 (Iowa 1991) 5

In re Richardson's Estate, 93 N.W.2d 777 (Iowa 1958)..... 5

Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) 3

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 112 (1988)..... 2

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)..... 2

Norris v. Hawaiian Airlines, Inc., ___ U.S. ___ (1994) 1, 2, 3

Terminal Railroad Ass'n v. Railroad Trainmen, 318 U.S. 1 (1943) 2

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

45 U.S.C. § 434 4

Iowa Code § 730.5 2

ARGUMENT IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. Introduction

The Iowa Supreme Court retroactively applied field preemption based on inferences of Congressional intent drawn from Federal Railway Administration ("FRA") regulations and inherent, but unexercised, powers of the Secretary of Transportation. Its indefensible misapplication of federal preemption principles and refusal to defer to the FRA's official opinion resulted in Petitioners' articulation of three important legal questions (and subset issues) in the Petition for Writ of Certiorari.

Virtually admitting its indefensibility, the CNW made no effort to defend the actual basis of the Iowa Supreme Court decision. Please consider that: (1) the CNW never refers to the fact that the FRA issued a legal opinion finding that its regulations do ***not*** preempt Iowa law; (2) the CNW never addresses the deference required to be given to federal agency opinions in preemption cases; (3) the CNW makes no argument related to the validity of retroactive regulatory preemption; and (4) the CNW never discusses the issue of field preemption based on unexercised authority.

Instead, the CNW's Brief in Opposition asserts strict limits on the applicability of *Norris v. Hawaiian Airlines, Inc.*, ___ U.S. ___ (1994) and raises yet another alternate theory of preemption based on the combination of *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299 (1989) ("Conrail"), and the Federal Rail Safety Act ("FRSA").

2. The RLA, the FRSA, or the combination of both, do not preempt Iowa Code § 730.5.

Congress "has never exercised authority to occupy the entire field of labor legislation," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985), never intended to preempt the regulation of working conditions and has not preempted the states from enacting valid legislation in these fields. *Terminal Railroad Ass'n v. Railroad Trainmen*, 318 U.S. 1, 6-7 (1943); *Metropolitan Life Ins., Co. v. Massachusetts*, 471 U.S. 724, 757 (1985).

In last Term's decision in *Norris v. Hawaiian Airlines, Inc.*, ___ U.S. ___ (1994), the Court held that the RLA does not preempt state laws creating causes of action independent of the collective bargaining agreement and that the analysis of *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 112 (1988) applies equally to the RLA as to the LMRA.

Conrail has no bearing on this case. Using the "major/minor dispute" method of analysis, the Court in *Conrail* merely decided that a unilateral rule change affecting drug and alcohol matters constituted a minor dispute under the RLA based on the record in that case. There were no claims in *Conrail* to an independent right of action arising under any other statute and, accordingly, the decision does not address *Norris* or *Lingle* issues.

Even CNW knew that the RLA did not preempt the state law otherwise it would not have recognized the applicability of the Iowa or Minnesota law to BMWE employees when the act was passed. App. at 45-48.

None of the cases cited by the CNW in support of its RLA preemption claim are applicable. All but one are pre-*Lingle* and each involves a state common law, not statutory, claim. See, *Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc.*, 372 U.S. 714, 719 (1963); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1052 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). In *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320 (1972), it was *conceded* that the only right not to be discharged arose solely from the collective bargaining agreement. All these cases were pre-*Norris*.

The FRA agency opinion clearly demonstrates that no federal preemption arises from the FRSA and the regulations flowing from that statutory authority. App. at 42-44. Ignoring that agency opinion, as the CNW did in its Brief, does not rebut its strength.

There is no conflict between federal and Iowa law. The CNW confuses the concept of a lack of uniformity with conflicts between federal and state law. These concepts are very different but, in any event, the "requirement for uniformity is not absolute" and it is a "limitation [which] still leaves the States a wide scope." *American Dredging Co. v. Miller*, ___ U.S. ___, 114 S.Ct. 981, 987 (1994).

The only "conflict" identified by the CNW is that permitted drug testing under the Iowa Code is less stringent than those of the CNW. This statement is only true to the extent that it removes from the CNW the discretion concerning rehires upon a final finding of a violation.

The carrier claims that because the Iowa statute is a general labor statute and not a safety statute, it cannot

come within the savings clause of the FRSA. However, the federal government classifies all laws relating to drug and alcohol matters on the railroads industry as "safety" laws. Consider that the CNW **itself** refers to its own drug and alcohol rules as totally or partially based on safety concerns. See, CNW Brief at pp. 7, 11, 13, 24, 26, 28. Is this a state law relating to safety? CNW certainly considered it to be so from 1987 to 1991 since the CNW specifically conformed to it.

Using CNW's own terminology, drug and alcohol issues relate to safety and, therefore, the Iowa statute certainly relates to safety including rail safety. The savings clause of 45 U.S.C. § 434 which provides power to the States to continue in force law relating to railroad safety until the Secretary adopts a regulation covering the subject matter of state requirement does not allow preemption in this case.

Obviously, in the event of ambiguity, the test requires "any indulgence in favor of the States". *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S.Ct. 2608, 2625-26 (1992).

3. There is no valid alternate ground of decision based on a claim to a right of summary judgment due to res judicata.

Res judicata arguments were raised by *both* sides in the Iowa District Court (arising out of an RLA case in Minnesota and a Chapter 730, Iowa Code case arising in Polk County, Iowa state district court). Neither was decided as part of the summary judgment ruling.

CNW's res judicata claim in its Brief in Opposition overstates both the law and the facts. Iowa law does not apply res judicata where the parties in the subsequent litigation did not have control over the parties to the Minnesota settlement agreement, did not have opportunity to bargain over the terms of the settlement and did not choose counsel for the settlement. *Harris v. Jones*, 471 N.W.2d 818, 820 (Iowa 1991); *In re Richardson's Estate*, 93 N.W.2d 777, 781 (Iowa 1958).

The issues in the settlement agreement were very different from the issues raised in these cases. It represents an amicable settlement in which the parties agreed to submit to the RLA arbitration mechanism all cases in which it was claimed that the CNW unilaterally changed working conditions related to Rule G. The settlement apparently anticipated the decision in *Conrail*. In contrast, this case addresses rights created by state law independent of the RLA.

The BMWE did not have authority to bargain away plaintiffs personal statutory right. These statutory rights were not waivable by the BMWE since its authority is restricted, in relevant part, to negotiation and resolution of mandatory and permissive topics of bargaining as defined by the RLA. The CNW has stated in an answer to an interrogatory that it has no bargaining duties under the RLA with regard to this topic. An affidavit was submitted in resistance to summary judgment by a respected member of the bar of this court, Larry Mann, and it disputed the factual and legal basis for the res judicata argument. It serves as sufficient basis of dispute as to deny summary judgment on this issue.

CONCLUSION

This case is worthy of a grant of certiorari for several substantial reasons:

The CNW did not seek state or federal agency opinions or declaratory judgment in state or federal court when it unilaterally decided to stop obeying Iowa and Minnesota law in 1991. Approximately 2,500 railway employees, are potentially affected by a carrier which is unwilling to respect the law. At least two states, Iowa and Minnesota, and their citizens are affected by the CNW's decision not to obey state law and the adverse social and economic consequences sought to be avoided by their legislatures when passing this legislation.

The effects of the CNW's position is, inter alia, to refuse to do that which Congress mandated, rehabilitation before discharge, using the hypocritical position that federal law mandates this result. While the CNW refers to the effect of Iowa's statute as one which would "water-down" the effectiveness of anti-drug and alcohol deterrents, there is no fact or opinion in the record of this case to support that claim. In making this claim, the CNW, finally reveals its real intent. Since such a belief is totally at odds with the core finding of Congress and the various states as to the urgent desirability of effective drug and alcohol rehabilitation, it is obvious CNW will use any argument to avoid compliance with this important goal.

Furthermore, the total disregard for well-established federal preemption principles in a published opinion of the Iowa Supreme Court may lead other courts to disregard the important precedents violated in this case.

The Petitioners request that the Court grant the Petition for the Writ of Certiorari and, following briefing and argument, that the decision of the Iowa Supreme Court be reversed and remanded for further proceedings.

Respectfully submitted,

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AFFIDAVIT OF LARRY MANN

~~STATE OF~~ District of Columbia)
) ss
_____ ~~COUNTY~~)

I, Lawrence M. Mann, being duly sworn on oath, hereby depose and state:

1. That I am a practicing attorney in Washington, DC and that I regularly represent the Railway Labor Executives Association and the various labor union brotherhoods throughout the United States.

2. That I was chief counsel for the Railway Labor Executives Association, et. al. in U.S. District Court, District of Minnesota, Third Division, Case No. 3-88-409, the subject of claimed res judicata in various Iowa litigation between the Chicago and Northwestern Transportation Company and rail laborers/union brotherhoods. I directed the Plaintiff's case in the U.S. District Court for the District of Minnesota, Fourth Division, Case No. 4-86-575

3. That I have personal knowledge and was directly involved in the drafting of the settlement agreement in the above-mentioned federal case in Minnesota.

4. That the federal case in Minnesota exclusively dealt with the questions of whether the Railway Labor Act prohibited the Chicago and Northwestern Transportation Company from making unilateral changes in its Rule G or ADU policy.

5. The settlement agreement in the federal case in Minnesota specifically agreed that the RLEA and the

named union brotherhoods would recognize that the Railway Labor Act provisions of Section 153 would exclusively govern the question of whether the Chicago and Northwestern Transportation Company had made unilateral changes or was prohibited by its collective bargaining agreement from taking action against its employees for claimed violations under ADU policy or Rule G.

6. The RLEA and the various union brotherhoods did not waive any state law rights, did not intent [sic] to waive any state law rights, and as a matter of law, were incapable of waiving any state law rights through the settlement agreement and disposition of the federal case in Minnesota.

7. The claim by the Chicago and Northwestern Transportation Company that the settlement agreement in the federal case in Minnesota was intended to or did waive any state rights that union brotherhoods or members of the union brotherhoods possess is without basis in fact or law.

8. The settlement and disposition in the Fourth Division federal case in Minnesota similarly disposed of the unilateral change questions related to Rule G. Like the other case, the Fourth Division case was not intended to and did not waive any state law rights which are at issue in the current litigation in Iowa.

9. The affidavit was transmitted by facsimile with my express consent and will be replaced later with a written original.

Further, I state not.

/s/ Lawrence M. Mann
LAWRENCE M. MANN

Subscribed and sworn to before me this 20th day of August, 1992.

/s/ Audrey A. Lucas
Notary Public, District of Columbia

AUDREY A. LUCAS
Notary Public, District of Columbia
My Commission Expires June 15, 1995.